Supreme Court, U.S.
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IN THE OFFICE OF THE CLERK

Supreme Court of the United States

ROMALA STONE, INC.,

Petitioner,

v.

THE HOME DEPOT U.S.A., INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The United States Court of Appeals for the Federal Circuit affirmed the judgment of the United States District Court for the Northern District of Georgia. The issues in the case on appeal involved patent infringement, breach of contract and unfair competition, which were fully briefed by the parties and followed by spirited, meaningful and probing oral argument by the Federal Circuit, which expressed concern during oral argument about conflicting precedents within its own Circuit on the issues before it; and the Federal Circuit, one day after such oral argument, pursuant to Federal Circuit Rules, Rule 36 issued a "judgment of affirmance without opinion," a one-word document which contained no legal analysis of the complex issues involved in the case and which failed to explain the reasons why the Federal Circuit chose to dispose of the case in a summary fashion, especially in light of the lengthy and probing discussion of conflicting issues and precedents in its own Circuit.

Two questions are presented:

1. Did the Federal Circuit's use of Rule 36[1] in *this* case effectively deprive Romala of its statutory right of appeal[2]?

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1. The entirety of Rule 36 is set forth under COURT RULE INVOLVED, on page 3 of this petition.

2. See 28 U.S.C. section 1291. An appeal is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. *McKane v. Durston*, 153 U.S. 684, 687, 14 S. Ct. 913 (1894)

2. Does Rule 36 when it is used by the Federal Circuit in *any* case effectively deprive appellants of their statutory right of appeal?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Federal Circuit.

The Petitioner here and appellant below is Romala Stone, Inc.

The Respondent here and appellee below is The Home Depot U.S.A., Inc.

By virtue of the allegations contained in its amended complaint, Petitioner sued Respondent for, inter alia, patent infringement; breach of written contract; and unfair competition.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner states as follows:

Romala Stone, Inc. is a for profit, closely held, corporation created under the laws of the State of California; whose stock is not traded publicly. There is no parent corporation that owns any of the stock of Romala Stone, Inc. There is no publicly held company that owns 10% or more of the stock of Romala Stone, Inc.

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Petitioner Romala Stone, Inc. ("Romala") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in *Romala Stone, Inc. v. The Home Depot U.S.A., Inc.*, No. 2010-1044.

OPINIONS BELOW

The judgment (of affirmance without opinion) of the United States Court of Appeals for the Federal Circuit is unpublished, and is reproduced in the Appendix to the Petition ("Pet. App." at 5a - 6a).[3] The judgment of the district court at issue in the appeal to the Federal Circuit was issued on September 17, 2009, in the case of *Romala Stone, Inc. v. The Home Depot, U.S.A., Inc.*, Case No. 04-CV-2307. (*Id.* at 1a - 4a).

STATEMENT OF JURISDICTION

The Federal Circuit issued its judgment on September 9, 2010. Since no opinion, statement or comment accompanied the Federal Circuit's judgment, Romala was effectively precluded under the Federal Rules of Appellate Procedure ("Fed. R. App. P.") from either petitioning for a panel rehearing or rehearing en banc. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

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3. Hereinafter, the United States Court of Appeals for the Federal Circuit will be referred to as "the Federal Circuit;" or simply "the court."

COURT RULE INVOLVED

Federal Circuit Rules, Rule 36 states:

> The court may enter a judgment of affirmance without opinion, citing this rule, when it determines that any of the following conditions exist and an opinion would have no precedential value:
>
> (a) the judgment, decision, or order of the trial court appealed from is based on findings that are not clearly erroneous;
>
> (b) the evidence supporting the jury's verdict is sufficient;
>
> (c) the record supports summary judgment, directed verdict, or judgment on the pleadings;
>
> (d) the decision of an administrative agency warrants affirmance under the standard of review in the statute authorizing the petition for review; or
>
> (e) a judgment or decision has been entered without an error of law.[4]

4. Rule 36 is unique to the Federal Circuit. Related rules in other federal courts of appeal provide that decisions on appeals take the form of either a published opinion (containing legal reasoning), an unpublished memorandum of decision (containing legal reasoning), or an order.

STATEMENT OF THE CASE

I. PROCEDURAL SUMMARY

Romala originally sued Home Depot on April 5, 2004, in the United States District Court for the Northern District of California. The following month, the case was transferred to the United States District Court for the Northern District of Georgia (the "district court").

The operative pleading is Romala's October 8, 2004 Amended Complaint ("amended complaint"). It contains causes of action for patent infringement; statutory unfair competition; common law unfair competition; breach of written contract; and breach of the implied covenant of good faith and fair dealing. The amended complaint attaches and incorporates by reference a copy of Romala's business method patent, and a copy of an Exclusive Sales Agreement between Romala and Home Depot, dated March 29, 2000.

From 2004 to 2009 Home Depot attacked Romala's amended complaint in piecemeal fashion.

On April 27, 2005, the district court granted Home Depot's motion to dismiss under Fed. R. Civ. P. 12(b)(6) ("Rule 12(b)(6)"), and dismissed, *inter alia*, Romala's unfair competition claims on the bases of patent law preemption and insufficient pleading of likelihood of confusion.

On October 1, 2007, the district court granted Home Depot's summary judgment motion, and invalidated

Romala's duly issued business method patent on the basis that the phrase "price affordable to an average consumer," which phrase appears in the preamble to the claims, was indefinite.

Finally, on March 30, 2009, the district court granted Home Depot's summary judgment motion on the breach of written contract claim, and ruled, with respect to the unperformed part of the contract, that the agreement was indefinite and unenforceable.

The district court's final judgment, disposing of Romala's case, was entered on September 17, 2009. It incorporated by reference, the district court's earlier orders of April 27, 2005; October 1, 2007; and March 30, 2009.

Romala's October 8, 2009 timely appeal to the Federal Circuit followed.

II. FACTUAL SUMMARY[5]

Romala was in the business of designing, manufacturing, packaging, marketing, and selling natural stone products, specifically, elegant granite bathroom vanity tops with a method that made the stone available at affordable prices to the average consumer shopping in high volume stores. On November 8, 1999, Romala filed a patent application concerning the method

5. This lawsuit never reached a trial by jury, as plaintiff intended, in the district court where the case was venued. This factual summary is derived from the allegations of Romala's amended complaint, and Home Depot's admissions contained in its answer to said amended complaint.

of manufacturing, packaging and marketing its natural stone products.

While its patent application was pending, Romala and Home Depot, in March of 2000, entered into an Exclusive Sales Agreement ("ESA"), giving Home Depot the exclusive right to sell its (Romala's) granite countertop products in its stores.

The contracting parties then agreed, pursuant to the ESA, on a plan whereby Romala's products were introduced in a number of Home Depot stores in the form of a pilot program, as the initial stage of a planned national rollout. With successful sales occurring and increasing as a result of the initial product placement, Romala's natural stone countertops were then placed and sold in additional Home Depot stores throughout the United States. From May 19, 1999, through 2002, sales of Romala's granite countertop products progressed exponentially each year in Home Depot's stores, resulting in millions of dollars in annual sales.

During the time of increased and expanding sales of Romala's products under the parties' ESA, while Romala's patent application was pending, and after Home Depot had learned of Romala's method of doing business, Home Depot, working in secret behind Romala's back, engaged in a scheme to have "copycat" copies of Romala's products manufactured, shipped and sold in Home Depot's stores under the Home Depot brand name of Pegasus, while simultaneously and systematically removing Romala's products from its stores.

In March of 2003, while the ESA was still in effect, at a meeting with Home Depot's management, Romala was advised that in September of 2003, Home Depot planned to stop selling Romala's products in its stores; clear Romala's product from its shelves, and in place and stead of Romala's product, start selling the copycat Pegasus product in its place.

Simultaneously in March of 2003, Romala learned that its patent application had been approved. Immediately thereafter, Romala warned Home Depot not to infringe on its newly approved patent, by manufacturing and selling the copycat Pegasus product in its stores, but Home Depot refused to refrain from doing so.

After Romala's patent was issued by the United States Patent and Trademark Office ("USPTO") as Patent No. US 6,594,973 B1, on July 22, 2003, and after Romala apprised Home Depot of the patent's issuance by the USPTO, Home Depot nevertheless rolled out its copycat Pegasus product for sale in its stores, placing them in the very same bays as had been occupied by Romala's product, and, simultaneously and systemically began removing Romala's product from Home Depot stores.

Romala's lawsuit against Home Depot followed.

REASONS FOR GRANTING THE PETITION

I. THE FEDERAL CIRCUIT'S CONFLICTING LEGAL PRECEDENTS BEING "IN TENSION" BUT RELEVANT TO THE ISSUES IN THIS CASE, AS EXPRESSED BY THE COURT AT ORAL ARGUMENT ON APPEAL, MADE THIS CASE UNSUITABLE FOR A RULE 36 NON-PRECEDENTIAL SUMMARY DISPOSITION

A. PATENT INFRINGEMENT

Romala secured a patent comprising a unique method for the sale of natural stone in the form of countertops easily installable in bathrooms and kitchens, packaging for the stone to prevent breakage, and a method of doing business to make the stone affordable and available in high volume stores to the average consumer.

In defending against Romala's suit, Home Depot attempted to attack the validity of Romala's patent on numerous and varied grounds. However, Home Depot was successful in the district court in only one argument. Pursuant to Home Depot's summary judgment motion, the district court determined that the phrase "price affordable to the average consumer, "found in the preamble to Claims 1 and 9 of the patent, was indefinite under 35 U.S.C. section 112, paragraph 2.

During the course of their briefing in the Federal Circuit, the parties discussed a number of issues in connection with the validity of the patent. Keen interest in these issues was expressed by the reviewing court at

oral argument, which was held on September 8, 2010, before The Honorable Randall R. Rader, Chief Judge ("Chief Judge Rader"); The Honorable Daniel M. Friedman, Circuit Judge ("Judge Friedman"); and The Honorable Richard Linn, Circuit Judge ("Judge Linn").

The "indefiniteness issue" was an issue the court focused on during oral argument, especially in questioning counsel for Home Depot. (Pet. App. at 14a - 19a). Chief Judge Radar and Judge Linn intimated that it was the court's obligation to determine if the district court was correct in interpreting the term "price affordable to the average consumer" from the perspective or viewpoint of one skilled in the art. (Pet. App. at 16a, and 28a). Yet the Federal Circuit never ruled on this issue, nor issued an opinion or comment discussing it.

A patent is presumed to be valid, and a party attacking its validity faces the evidentiary burden of showing by clear and convincing evidence the facts supporting a conclusion of invalidity. *Ultimax Cement Mfg. Corp. v. CTS Cement Mfg. Corp.*, 587 F. 3d 1339, 1351 (Fed. Cir. 2009). On appeal, Romala forcefully argued that the district court, in its decision, never set forth *any* facts, much less ones rising to a showing of clear and convincing evidence. This lack of evidentiary support was discussed by Romala's counsel at oral argument. (Pet. App. at 31a - 32a). But this issue was not addressed (nor could it be) with the Federal Circuit's use of a Rule 36 judgment.

One of the major topics discussed by the court and counsel at oral argument, and extensively briefed by the parties, was whether the phrase "price affordable to the

average consumer" in the preamble to the claims, limited the scope of Claims 1 and 9 of the patent. Judge Linn recognized that this case posed an interesting issue that was difficult to resolve. In questioning Home Depot's counsel, Judge Linn stated:

> "I would admit it's an interesting issue here, because on the one hand . . . we have clear precedent that where you add subject matter to achieve allowability of a claim, that that subject matter counts and is a limitation....
>
> On the other hand, we have some pretty clear precedent that says if you set forth in a preamble something that is just a purpose or goal, that's not necessarily limiting.
>
> So here we have the curious situation where something was added to the preamble at the very end that resulted in allowance, but the subject matter that was added seems to be simply a goal or an objective.
>
> So you have both precedents in some tension." (Pet. App. at 25a - 26a).

Despite the considered interest in this issue expressed by the court at oral argument, the importance of the issue to the parties on appeal, and a possible conflict in the law in the Federal Circuit, the court again essentially dismissed the issue by rendering a Rule 36 judgment instead of a fully reasoned legal opinion.

B. BREACH OF CONTRACT

While Romala's patent was pending, Romala and Home Depot entered into an "Exclusive Sales Agreement ("ESA"). Under the ESA, Home Depot was given the exclusive right to sell Romala's granite countertop products in its stores. Pursuant to this contract, the parties agreed to, and implemented, a limited sales program in which Romala's products were introduced into and sold in a select number of Home Depot's stores. When sales proved successful, the parties then agreed, and implemented, pursuant to the ESA, a program where Romala's products were introduced into, and sold, in an ever greater number of Home Depot's stores, eventually rolling out across the United States. Most significantly, in its answer to Romala's amended complaint, Home Depot admitted that it had an obligation to perform under the ESA, as described herein above above.

The district court, in ruling against Romala on its breach of contract claim, divided its discussion into the performed part of the contract (up to that point) and the unperformed part of the contract. As to the performed part of the contract, the district court held the contract to be valid. But, as to the unperformed part of the contract, the district court ruled that the terms of the ESA were indefinite and did not impose a requirement on Home Depot to purchase *even one* Romala countertop; hence, the court ruled, the agreement lacked mutuality of obligation and was unenforceable. In addition, as to the contract's unperformed part, the district court ruled that the parties had not reached a meeting of the minds on such details as minimum number of products to be purchased;

minimum number of stores in which Romala's products were to be sold; and, the exact locations of these stores.

In its briefing before the Federal Circuit, Romala contended, *assuming arguendo*, that even if some of the terms of the ESA were indefinite, the parties' performance under the contract filled in and defined any missing terms. In addition, in its briefing and at oral argument, Romala argued that pursuant to relevant principles of contract interpretation, the terms of the ESA were not vague or indefinite.

At oral argument, the members of the court showed great interest in both issues; that is, the contract interpretation issue and the parties' pattern of performance issue. Both Chief Judge Rader and Judge Friedman extensively questioned Romala's attorney on the interpretation issue. And Judge Linn acknowledged that the court's responsibility was to independently interpret the contract. The conduct of the parties issue also occupied the court's attention at oral argument. Chief Judge Rader questioned Home Depot's counsel on this issue:

> "I'd like to turn you for a second to the contract claim.
>
> Once you have a pattern of conduct, why can't you weave that in to achieve the mutuality (of obligation) that is required?" (Pet. App. at 29a - 30a).

After receiving a response from Home Depot's counsel, Chief Judge Rader further pressed the matter with him:

> "But would this pattern of conduct be enough to satisfy the mutuality?
>
> It's almost a reliance argument, and equitable reliance — detrimental reliance. They've built up a mutuality based on past conduct.
>
> Would that satisfy?" (Pet. App. at 30a).

Yet, despite the fact that the Federal Circuit showed great interest at oral argument in the contract interpretation issues, and the parties' pattern of conduct and past performance issues, the Federal Circuit utilized Rule 36 to summarily dispose of the case without opinion or comment.

C. UNFAIR COMPETITION

In addition to bringing claims against Home Depot for patent infringement and breach of contract, Romala also claimed common law unfair competition. The district court, in granting Home Depot's Rule 12(b)(6) motion, dismissed the unfair competition claims from the case. There were two bases for the dismissal: (a) federal patent law preemption (with the district court citing its decision in *Rodime PLC v. Seagate Tech. Inc.*, 174 F. 3d1294 (Fed. Cir. 1999) ("Rodime"); and (b) the amended complaint's failure to plead "likelihood of confusion."

When Romala's appeal reached the Federal Circuit, the parties briefed the following two issues: (a) whether Rodime, as to the preemption issue, supported the district court's decision, or

actually supported Romala's position as alleged in its amended complaint; and (b) whether the amended complaint did in fact contain sufficient allegations of likelihood of confusion with Romala's products in Home Depot's stores and Home Depot's copycat products in these same stores.

As with the patent infringement and breach of contract issues, the Federal Circuit at oral argument expressed great interest in the likelihood of confusion issue, as it pertained to Romala's unfair competition claim, and the sufficiency of notice pleading therein.

At oral argument, Chief Judge Rader was keenly interested in the likelihood of confusion issue, as evidenced by his questioning of Home Depot's counsel:

> "Could I move you to the unfair competition claim?
>
> The district court says this is preempted by patent law, but, of course, patent law has no such test about likelihood of confusion of customers. That seems to be a very different form of legal protection.
>
> Did the district court err on this?" (Pet. App. at 19a).

In response to Chief Judge Rader's queries, Home Depot's counsel argued that likelihood of confusion must stem from something other than simply alleging that Home Depot had copied Romala's products.

But Chief Judge Rader further pressed Home Depot's counsel:

> "But, see, isn't that — isn't pleading those facts enough to put the issue of confusion in effect, copycat products or copycat?
>
> Why? Because they mimic the other products and cause confusion with them.
>
> In other words, weren't the facts enough to put the issue in place, even if they didn't use the word 'likelihood of confusion'?" (Pet. App. at 21a).

Chief Judge Rader's statements clearly indicate that, in the court's view, Romala had adequately pled its case, satisfying the federal notice pleading standard, on the likelihood of confusion issue. Yet, the Federal Circuit utilized Rule 36 without opinion or comment on this issue.

Pleading requirements in federal courts are liberally construed.(Fed. R. Civ. P. 8(a)(2), and this Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1964-1965).The court expressed concern with dismissing Romala's unfair competition claim on a 12(b)(6) motion based upon the record before it.

Yet, despite the fact that the Federal Circuit showed great interest at oral argument in whether Romala's amended complaint met the liberal pleading requirements to plead a cause of action for common law unfair competition, the Federal Circuit utilized Rule 36 to summarily dispose of the case without opinion or comment.

II. RULE 36 EFFECTIVELY DEPRIVES APPELLANTS (INCLUDING ROMALA HEREIN) OF THEIR STATUTORY RIGHT OF APPEAL.

Rule 36 enables the Federal Circuit to issue a "judgment of affirmance without opinion" if it determines that any of the five conditions in the rule apply, and that "an opinion would have no precedential value."[6]

In the Federal Circuit's own words, Rule 36 applies when a case is an easy one to decide; the district court's explanation of its decision was clear and sound and no purpose would be served by the court writing an opinion; or where an appeal lacks merit. *Sparks v. Eastman Kodak Company*, 230 F. 3d 1344, at 1345 (Fed. Cir. 2000).

As outlined herein above, and as specifically discussed by the Federal Circuit at oral argument on the appeal in this matter, this case was not "an easy one to decide"; the district court's explanation of its decision was not "clear and sound"; and, "a purpose would have been served" by the court writing an opinion, as the court expressed meaningful reservations about the district court's rulings in all three of the issues before it: patent infringement, breach of contract, and unfair competition. On each issue the Federal Circuit expressed serious concerns: on patent infringement—that there are two lines of legal precedents that are "in tension" in the Federal Circuit on the issue in this appeal which need to be resolved; on breach of contract—whether the

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6. Only subparagraphs (a), (c) and/or (e), of Rule 36, could theoretically apply to Romala's appeal.

parties' pattern of conduct filled in any missing terms or defined any indefinite terms, such that the purposes and intent of the contracting parties are fulfilled; and, on unfair competition—that the federal notice pleading requirements were met and likelihood of confusion were sufficiently pled.

The use of Rule 36 in this case effectively denies Romala its right to appeal as it meets none of the criteria required for its use, yet the appeal is summarily disposed of without opinion or comment, nullifying appellant's ability to effectively move forward in the appellate process.

The existence of Rule 36, and the Federal Circuit's use of it in this case, deprived Romala of any right to seek either a panel rehearing (see Fed. R. App. P. 40(a)(2))[7] or a rehearing en banc (see Fed. R. App. P. 35(b)(1)(A)–(B))[8], from the Federal Circuit. Since no opinion, legal reasoning or comment accompanied the Rule 36 judgment in this case, Romala could not satisfy any of the criteria of Fed. R. App. P 40(a)(2) or 35(b)(1)(A)–(B). To petition for either type of rehearing, Romala would have to speculate on the reason or reasons why the Federal Circuit invoked Rule 36 in deciding its appeal.

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7. Fed. R. App. P. 40(a)(2) requires that a panel rehearing petition ". . . state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended . . ."

8. Fed. R. App. P. 35(b)(1)(A) – (B) requires that an en banc rehearing petition state either that the panel decision conflicts with a decision of this Court or of the circuit court issuing the decision, and uniformity is required; or that the proceeding involves one or more questions of exceptional importance (specifically where the panel decision conflicts with a decision of another circuit court).

This Romala could not do, and therefore was effectively denied its right to appeal.

Moreover, what happened to Romala here would equally apply to any other appellant whose appeal was resolved through the issuance of a Rule 36 judgment. Rule 36 would also deprive such other appellants of their statutory right of appeal under 28 U.S.C. § 1291.

III. CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION ORDERED SEPTEMBER 17, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION FINAL JUDGMENT

CIVIL ACTION NO. 1:04-CV-02307-RWS

ROMALA STONE, INC.,

Plaintiff,

v.

HOME DEPOT U.S.A., INC.,

Defendant.

FINAL JUDGMENT

Plaintiff and Counterclaim-Defendant Romala Stone, Inc. ("Romala") and Defendant and Counterclaim-Plaintiff Home Depot U.S.A., Inc. ("Home Depot"), by and through their undersigned counsel, and, in accordance with Rule 54(b), hereby stipulate and agree, subject to the approval of the Court, as follows:

1. On October 8, 2004, Romala filed its Amended And Restated Complaint (the "Amended Complaint") in this action alleging counts for infringement of U.S. Patent No. 6,594,973 B1 ("the '973 Patent") (Count I); unfair

competition, and deceptive trade practices (Count II); common law unfair competition (Count III); breach of contract, alleging breach of the Exclusive Sales Agreement ("ESA") dated March 29, 2000 (Count IV); trade secret misappropriation (Count V); and for attorneys' fees pursuant to O.C.G.A. § 13-6-11 (Count VI). (See, generally, Am. Compl. [Dkt. No. 38]).

2. On April 27, 2005, the Court issued an order granting Home Depot's motion to dismiss and issued an Order dismissing Counts II, III, and V of the Amended Complaint. (Dkt. No. 56).

3. On May 12, 2005, Home Depot answered Counts I, IV, and VI of the Amended Complaint and filed a Counterclaim seeking a declaratory judgment of noninfringement, invalidity, and unenforceability of the '973 Patent. (*See, generally*, Answer [Dkt. No. 66]).

4. On September 28, 2007, the Court issued an order granting Home Depot's Motion For Partial Summary Judgment Of Invalidity For Indefiniteness Under 35 U.S.C. § 112 ¶ 2. (Dkt. No. 160).

5. On May 7, 2008, Home Depot filed a Motion For Summary Judgment on the remaining breach of contract claim and, in the alternative, partial summary judgment limiting Romala's damages on that claim. (Dkt. No. 221).

6. On May 9, 2008, Romala filed a Motion For Summary Judgment on the remaining breach of contract claim. (Dkt. No. 224; Dkt. No. 255 at 5).

7. On March 30, 2009, the Court issued an order granting, in part, and denying, in part, Home Depot's motion for summary judgment, and denying Romala's motion for summary judgment, on the breach of contract claim. (Dkt. No. 255).

8. Romala and Home Depot stipulate and agree that, pursuant to the Court's determination in its March 30, 2009 Order, any issues remaining for trial thereby, are resolved in favor of Home Depot.

9. The Court's orders dated April 27, 2005; June 14, 2006; September 28, 2007; and March 30, 2009 are incorporated by reference as though fully set forth verbatim herein and made a part hereof.

10. Romala retains the right to appeal from the Judgment to the Federal Circuit Court of Appeals and/or any other applicable court of appeals and, as part of said appeal, to attack the propriety of and appeal from not only this Judgment but also the Court's orders dated April 27, 2005; June 14, 2006; September 28, 2007; and March 30, 2009, and any and all orders, rulings, and decisions in the above encaptioned action.

11. Accordingly, the parties agree that Judgment shall be entered in favor of Home Depot on all claims set forth in the Amended Complaint and in favor of Home Depot on its Counterclaim.

12. All parties shall bear their own costs of suit, including but not limited to attorney's fees, expert witness fees, witness fees, and court and litigation costs.

Appendix A

SO ORDERED, this 17th day of September, 2009.

/s/
RICHARD W. STORY
United States District Judge

Stipulated to:

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APPENDIX B— JUDGMENT OF THE UNITED STATES COURT OF APPEALS DATED SEPTEMBER 9, 2010

NOTE: This disposition is nonprecedential.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ROMALA STONE, INC.,

Plaintiff-Appellant,

v.

THE HOME DEPOT U.S.A., INC.,

Defendant-Appellee.

2010-1044

Appeal from the United States District Court for the Northern District of Georgia in No. 04-CV-2307, Judge Richard W. Story.

JUDGMENT

THOMAS N. PARSEKIAN, Parksekian Law Corporation, of Laguna Niguel, California, argued for plaintiff-appellant. Of counsel was SANFORD ASTOR, Lewis Brisbois Bisgaard & Smith LLP, of Los Angeles, California.

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HOLMES J. HAWKINS III, King & Spalding LLP, of Atlanta, Georgia, argued for defendant-appellee. With him on the brief were LETITIA A. MCDONALD, THOMAS C. LUNDIN JR.; and PAUL D. CLEMENT and DARYL L. JOSEFFER, of Washington, DC.

THIS CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

PER CURIAM (RADER, *Chief Judge*), FRIEDMAN, and LINN, *Circuit Judges*).

AFFIRMED. *See* Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

Dated Sep 9 2010

/s/_____

Jan Horbaly
Clerk

APPENDIX C — TRANSCRIPT OF RECORDED PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[1] 2010-1044

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CASE NO. 04-CV-2307

ROMALA STONE, INC.,

Plaintiff-Appellant,

v.

THE HOME DEPOT U.S.A., INC.,

Defendant-Appellee.

REPORTER'S TRANSCRIPT OF RECORDED PROCEEDINGS (MP3) ORAL ARGUMENT

September 8, 2010
10:00 a.m.

United States Court of Appeals
for the Federal Circuit
717 Madison Place, Northwest, Room 401
Washington, D.C.

Annie Doezie, CSR No. 8478

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[2] APPEARANCES

The Appellate Judges:
CHIEF JUDGE RANDALL R. RADER
CIRCUIT JUDGE DANIEL M. FRIEDMAN
CIRCUIT JUDGE RICHARD LINN

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[3] WASHINGTON, D.C.

SEPTEMBER 8, 2010; 10:00 A.M.

CHIEF JUDGE RADER: Romala Stone versus Home Depot.

Mr. Parsekian?

MR. PARSEKIAN: "Par-seek-ian."

CHIEF JUDGE RADER: Parsekian. I was close. You may proceed.

MR. PARSEKIAN: Thank you, your Honor.

May it please the court, the infringement in this case, which is unique, was motivated by Home Depot's contractual obligation to continue to buy and sell Romala's product.

They wanted to cut out the middleman and make it themselves. So they learned the patented process while the patent was pending, and after it was issued, cleared Romala's product out of its stores and replaced it with their own copycat Pegasus product, driving Romala, ultimately, out of business.

And these bad acts, as alleged, give life to the unfair competition claim as well.

So the three claims that are before the court, the three issues, are really inextricably intertwined. They all happen together.

[4] And what makes this case somewhat unique is that these were not two ships passing in the night, two companies, where one infringed on the other and never met, except for in a patent infringement case.

These were two companies that had an intimate business relationship, a successful one, together, and that relationship was used to –

JUDGE FRIEDMAN: What has all –

MR. PARSEKIAN: — facilitate the patent infringement.

JUDGE FRIEDMAN: What has all of this got to do with the questions as to the meaning and validity of the patent?

MR. PARSEKIAN: Yes.

In the district court, the court really focused in on two words, "price affordable," and that's really where it goes.

CHIEF JUDGE RADER: Why did you amend –

MR. PARSEKIAN: Yeah.

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CHIEF JUDGE RADER: — the claims to include that?

MR. PARSEKIAN: The "price affordable" phrase, which, in total, is "price affordable to the average consumer," and, again, "average consumer" was construed and accepted, not in issue here, but that phrase,

* * *

[11] one of skill in the art would understand this term?

MR. PARSEKIAN: Right.

CHIEF JUDGE RADER: If we look at column 2, lines 51 through 55, they say the price would be attractive because the cutting of the stone today is done by specially trained persons, essentially, defining this affordability in terms of not using specially trained persons.

MR. PARSEKIAN: Right.

CHIEF JUDGE RADER: One of skill in the art would understand that it's not subjective; right?

MR. PARSEKIAN: Yeah.

CHIEF JUDGE RADER: That's your argument?

MR. PARSEKIAN: Yeah — yes, because –

CHIEF JUDGE RADER: And particularly on 112(6), that's a pretty hard argument to overcome, isn't it?

MR. PARSEKIAN: Well –

JUDGE FRIEDMAN: Let me ask you another question. When you use the word "affordable," to me, connotes a relationship to the income of the purchaser. What may be — something may be affordable to a person with an income of a million dollars a year but wouldn't be affordable to someone with an income of $20,000 a year.

[12] So I don't see that "affordable" can be translated as meaning to a person of ordinary skill in the art, how it was made, who did it, where it was made, et cetera.

It's whether they, in their financial position, would be able to handle the cost of this product.

MR. PARSEKIAN: Respectfully, your Honor, I just don't see it that way, that I think that if you give it its plain reading and that people — that you do know that the product is meant to be made in plurality and delivered to box stores, to be sold off the shelves.

And the industry has been around a — stonecutting has been around a long time, and we all know that for years and years and –

JUDGE FRIEDMAN: Suppose –

MR. PARSEKIAN: — that it requires –

JUDGE FRIEDMAN: Suppose you had this product –

MR. PARSEKIAN: — an additional cost.

JUDGE FRIEDMAN: — this product, as if it was sold on the shelves, and the price was — it's an absurd example, but it's a test, and the price was $5,000. Would you say that was affordable to the average customer?

MR. PARSEKIAN: No –

[13] JUDGE FRIEDMAN: Why not?

MR. PARSEKIAN: -- and the market will dictate that.

JUDGE FRIEDMAN: Why not?

CHIEF JUDGE RADER: But it's not asking for a price. It's asking you to eliminate the specially trained person; right?

MR. PARSEKIAN: Eliminating this — that's part of the process of getting that stone top into place.

It has always required hands to cut and fabricate and install, which is a highly skilled thing that needs to

be done, and it's very expensive to do. It's never been done any other way.

This invention is, at the source, to assembly-line cut natural stone, granite, deliver it to the market in plurality, such that the cost is so low that on the market, people will be looking at a price of maybe $150 instead of $3,000. That's what will happen if the invention is practiced.

And I believe that in the specification, that is laid out specifically. I don't think we can look at that and say that we don't know what "affordable" means in the context, in the context, of this patent.

JUDGE LINN: If the manufacturer is selling both the pre-cut boxed units that are described in the

* * *

[24] MR. CLEMENT: Thank you, Mr. Chief Judge, your Honors, and may it please the court.

Romala Stone seems to have buyer's remorse on a number of the strategic litigation decisions they made below.

In the proceedings below, they never took issue with the idea that the key term "price affordable to an average consumer" was a limiting term that had to be construed. They proposed their own construction. They had their experts support their proposed construction.

They went so far in the district court proceedings to essentially mock Home Depot for wasting four pages of its brief trying to make clear that this was a limiting term.

That's at joint appendix page 999.

JUDGE LINN: Mr. Clement, you obviously perceived from my earlier questions that I have some concerns about this term "price affordable."

And — but on the other side of the coin, the specification does seem to talk about some relative meaning of that term, relative to the cost of a custom cut piece of granite.

So why — given that our standard of 112 ambiguity is that it be insolubly ambiguous before it can be declared invalid, then why is it not appropriate [25] for us to interpret this term, give it some meaning, and — and give it the meaning that might be gleaned from looking at the specification, in general?

That is, it's a price that isn't burdened by the cost of custom cutting.

MR. CLEMENT: Well, your Honor, a couple of responses.

First, I think if you look in the specification, as we suggest in our brief, that just creates more problems than it solves, because the specification talks about this

being affordable and that the problem with custom cutting is that's only affordable by an affluent customer, and, of course, there's another relative term that's not defined.

The other thing, your Honor, is it does seem –

CHIEF JUDGE RADER: We have relative terms all the time in patent law. Every claim that I've read always has a relative term in it.

The question is whether one of skill in the art would be able to discern the meaning of that anyway.

Why wouldn't one of skill in this art understand that you're cutting out the custom skilled worker, and that's what is meant by the affordability?

MR. CLEMENT: Well, Mr. Chief Judge, I think there's sort of two ways someone in the skilled – [26] skilled in the art could try to make sense of this term.

One would be to try to make sense in its more straightforward iteration, and I think it just wouldn't work, for the reasons that were discussed in the first 15 minutes.

The best method that might be available is the one that you suggested, which is to try to say, "Well, all this means is it's not custom cutting, and custom cutting is expensive."

But I don't think that works, for a couple of reasons, your Honor.

With respect to what I think was the particular statement in column 2 that you –

CHIEF JUDGE RADER: Yes, 51 through 55?

MR. CLEMENT: I'm sorry. You're at lines?

CHIEF JUDGE RADER: 51 through 55.

MR. CLEMENT: 51 through 55.

And there is that statement here. I actually thought you were referring to –

CHIEF JUDGE RADER: Because –

MR. CLEMENT: — where they state the objects of the invention, and this seems, to me, to get to the problem.

CHIEF JUDGE RADER: Yeah, that would work, too.

MR. CLEMENT: Well, okay, but the problem there [27] is they say, "So it's available to the average consumer," and then they say, "particularly the do-it-yourselfer," would suggest, to me, that the do-it-yourselfer is a subset of those to whom it's been made affordable to.

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And what that brings me to, I guess, is the broader point, which is this patent, in various places, already gets to the notion that what's going on here is that you have an easily installable product that's not custom installed. It doesn't have to be custom cut.

I mean, that's, in a sense, the whole point of, you know, that it's a pre-cut top to a retail — for sale to and installation by the average consumer.

So I think if you read this "price affordable to the average consumer" to simply mean not pre-cut, then you've essentially writ it out of the patent entirely.

I think that's really the problem the district court had here, which is — and if you go to the prosecution history, I think it's relevant that when the inventor put the affidavit in — this was at the end of the process, right before they finally convinced the examiner to allow the patent.

When they were talking about the affordability concept in that affidavit, it was in the conjunctive [28] with installation.

And so they were talking about a product that was affordable to the average consumer and installable by the average consumer, with the suggestion that those are — those are different concepts.

So I think that's the problem with trying to simply say all this means is something less than a custom installation.

CHIEF JUDGE RADER: Could I move you to the unfair competition claim?

The district court says this is preempted by patent law, but, of course, patent law has no test about likelihood of confusion of consumers. That seems to be a very different form of legal protection.

Did the district court err on this?

MR. CLEMENT: No, it didn't, Mr. Chief Judge, and let me try to make two points about that.

First is, even if we assume, for present purposes, which is true and was actually agreed upon by the parties below, that there is an element of the Georgia law of unfair competition that is likelihood of confusion, that wasn't pled in this case.

And that was the primary reason, I think, why the district court rejected this claim.

I mean, put federal preemption aside for a [29] minute. If you're going to bring a state law claim, your first burden is to plead inadequate state law claim, and here there's nothing in the complaint that pleads the –

CHIEF JUDGE RADER: Is there enough in the complaint to survive a 112(6)?

As we know, that's a pretty minimal requirement.

MR. CLEMENT: Well, there's not, and there's not, for two reasons, your Honor.

One is because there's nothing that goes to the pleading of that element at all.

And then if you look at — to make matters worse, then — and the district court judge relied on this. It's at footnote 2 of the Motion to Dismiss, which is at 100 in the joint appendix.

He points out that not only do they plead, but they plead — but then they come into court and expressly disclaim any trade dress claim whatsoever.

And so — I mean, it's worse than just not pleading likelihood of confusion. They affirmatively disclaim that what at least the Supreme Court has pointed to as being the precise kind of likelihood of confusion that voids preemption, which is essentially a trade dress claim.

[30] JUDGE LINN: Isn't it fair to say that what we have here is more akin to a failure of pleading that 12(b)(6) problem than a preemption problem?

And just for court, of course, it makes the adjudication on 12(b)(6), albeit in a footnote.

MR. CLEMENT: I agree with you, your Honor. It's — first and foremost, it's a 12(b)(6) problem. The preemption, in a sense, I think, plays an assisting role in that, and the judge relied on both of these. They were clearly alternative grounds.

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The reason, I think, they played an assisting role is — this isn't just a matter of indifference whether Georgia law has this element, likelihood of confusion. If Georgia law doesn't have that element, then Georgia law would be preempted.

And one thing further on just the preemption point, I think this is important, and this really goes back to the Supreme Court Sears against Stiffel case.

Even if you come in and allege copying and you allege likelihood of confusion, that's not enough. That's — those were the facts in Sears against Stiffel.

You have to make clear that the confusion stems from something other than the fact that you're copying the product, and that's what's completely missing here.

Because if you disclaim any trade dress theory [31] and then just look at what's alleged under unfair competition, what's alleged is, "They copied our product, and they marketed a copycat product."

CHIEF JUDGE RADER: But, see, isn't that — isn't pleading those facts enough to put the issue of confusion in effect, copycat products or copycat?

Why? Because they mimic the other products and cause confusion with them.

In other words, weren't the facts enough to put the issues in place, even if they didn't use the word "likelihood of confusion"?

MR. CLEMENT: I certainly don't think so, Mr. Chief Judge. I think if the –

CHIEF JUDGE RADER: But if the facts are enough, that would suffice.

We agree on that point, don't we?

MR. CLEMENT: If the facts are enough to satisfy the element –

CHIEF JUDGE RADER: Yes.

MR. CLEMENT: — then the fact that they didn't articulate it as an element, I suppose that's fair enough, but I don't think these facts are enough –

CHIEF JUDGE RADER: (Inaudible.)

MR. CLEMENT: — I don't think they're anywhere near enough, and precisely because I think it gets to [32] this point that it's not enough to come into court and say, "Well, I have an unfair competition claim, and what am I going to allege? I'm going to allege copying."

JUDGE LINN: Mr. — Mr. –

MR. CLEMENT: That doesn't get it done because — I'm sorry.

JUDGE LINN: No, no. Go ahead and finish your thought.

MR. CLEMENT: My only thought, to finish it, was if the likelihood of confusion stems only from the copying, that's squarely — that's squarely preempted.

So likelihood of confusion, as a matter of Georgia law, because I don't know why you'd want to interpret Georgia's likely having a preempted law, has to be likelihood of confusion as to source, and that's exactly what they disclaimed.

JUDGE LINN: Sorry. I want to bring you back to Claim 1 of the patent for a minute, just one — one further question.

This term that we've been discussing, "price affordable," is in a clause. The complete clause is not really discussed in the briefs, but the complete clause is, "To enable assembly-line production and sale of the top at a price affordable to an average consumer."

So it's a clause that addresses or sets forth, [33] seemingly, a goal or an objective to enable this.

Presumptively, to infringe this patent doesn't mean that you actually have to do that, as long as the method you employ is one that would enable the accomplishment of what is set forth.

So in that sense, it does sound like it's just a goal or a purpose or an aspiration and not a limitation.

What's your comment to that?

MR. CLEMENT: My comment to that would be I suppose if one were reading this language, just in the abstract, and one didn't have the benefit of prosecution history and didn't have the benefit of the way this case was litigated below, one might come to that conclusion.

But when I read this court's cases, they seem to say the language, even if it's in the preamble, can, nonetheless, be limiting, based on a variety of factors, including the prosecution history.

And I don't see any suggestion that that doctrine is somehow not applicable if it's not only in a preamble, but it's in language that might otherwise, at first blush, really play –

CHIEF JUDGE RADER: But I think that –

(Overlapping speakers)

MR. CLEMENT: — purpose.

[34] CHIEF JUDGE RADER: I think that Judge Linn is giving full meaning to the clause.

He's just saying the full meaning, he puts it in the context of an assembly method, and the assembly method, therefore, is — leads us back to that column 2 reference about specially trained custom-designed methods which one of skill in the art would understand.

I think that's where Circuit Judge Linn is taking us, and there does seem to be some logic to that.

MR. CLEMENT: Well –

CHIEF JUDGE RADER: He's not reading it — he's not ignoring it. He's giving meaning to it but in a way that is satisfied by the patent owner.

MR. CLEMENT: And, again, I mean, whatever that — whatever sense that might make, just in the abstract, I think if you look at both the way that — the way this case was prosecuted before the examiner and the way that it was prosecuted before the district court, this language is being treated as much more as limiting language.

And, again, there's the basic history that you pointed out that is, I think, supported by the fact that when in the inventor's affidavit, this concept seems to be injected at that point in the proceedings, it's introduced as a concept that's distinct just from ease [35] of installation or obviating the need for a custom installer.

JUDGE LINN: I would admit it's an interesting issue here, because on the one hand, as you correctly point out, we have clear precedent that where you add subject matter to achieve allowability of a claim, that that subject matter counts and is a limitation.

So even if it's in the preamble — and we have precedent that makes that explicitly clear.

On the other hand, we have some pretty clear precedent that says if you set forth in a preamble something that is just a purpose or a goal, that's not necessarily limiting.

So here we have the curious situation where something was added to the preamble at the very end that resulted in allowance, but the subject matter that was added seems to be simply a goal or an objective.

So you have both precedents in some tension.

MR. CLEMENT: Right, and I would say two things, your Honor.

One, I think the more specific precedents are the ones that deal with the specific situation of the prosecution history, and it allows that prosecution history to be able to take a term that might not otherwise be limiting and make it limiting.

[36] The second thing, though, I would say is if you were looking for a tie-breaker, I think that actually comes in the way this case was litigated, because there's more than just forfeiture or waiver at issue here.

I think there is strategic behavior, and I don't mean that in an overly prejudicial way, but this is the patent that is, I think in fairness, a problematic patent.

And if you look at the affirmative defenses that Home Depot laid out, the defenses were not just indefiniteness. They were things like patentable subject matter, but also novelty and also obviousness.

And so if in the process of claim construction additional limiting terms can be put into this patent, that is going to help Romala Stone down the line to fend off some of these other defenses.

And that may explain why they were so eager before the special master and before the district court judge to make this a term that they were perfectly happy to propose their own construction on, that they were perfectly happy to have their expert on.

And then when that didn't work in the district court — because unlike the special master, the district court sort of looks at that term and says, [37] "Well, you know, that's a limiting term." Then it's indefinite, and that renders the patent invalid.

Now we sort of have buyer's remorse in this court, and they're trying to change gears.

JUDGE LINN: (Inaudible.)

MR. CLEMENT: And I think there's an important policy for this court to not — to not allow that and –

JUDGE LINN: There may be another way to look at this, and that is that since that language, as well as

other language, was added to secure allowance, you could say that, "Well, this is a method claim."

And the phrase "to enable assembly line production and sale at a price affordable" is the same as adding another method step that would be enabling assembly line production and sale.

That would be a typical method step.

So that that — it does have meaning. It does have consequence. It is the same as any other method step limitation in the claim, which brings us back to Square One: What does "price affordable" mean?

So I do think that the tension in our precedent that I alluded to earlier is an interesting one.

But at the end of the day, the problem that we have to confront and what we have to decide, I think, is whether the district court was correct in interpreting [38] "price affordable" and me saying that it is insolubly ambiguous.

MR. CLEMENT: Well — and I certainly agree with that, that is — becomes the critical question.

I think on this, the district court's analysis is correct, because I do think that unless you default to the idea that, well, you know, the term just kind of has to go, and we're just going to say that that just means –

CHIEF JUDGE RADER: It's not what the district court thinks it means. It's what one skilled in the art thinks it means.

I have a feeling that a construction guy who's cutting table countertops understands what the — what kind of method this is enabling.

MR. CLEMENT: Well –

CHIEF JUDGE RADER: I'd like to turn you for a second to the contract claim.

Once you have a pattern of conduct, why can't you weave that in to achieve the mutuality that is required?

MR. CLEMENT: Well, I guess one answer would be because Georgia law is very clear that that's not a step that you take, and there were sort of vague allusions to Georgia law in the first 15 minutes.

[39] But, I mean, to talk specifics, the Wedgewood Carpets case, which the district court relied on, the Drug Line case, which is a more recent application of that. So enough time has now passed the Wedgewood Carpets case by.

Those were cases where Georgia has sort of some tough law that requires mutuality.

And both the Drug Line case and the Wedgewood Carpets case arises –

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CHIEF JUDGE RADER: But would this pattern of conduct be enough to satisfy that mutuality?

It's almost a reliance argument, an equitable reliance — detrimental reliance. They've built up a mutuality based on past conduct.

Would that satisfy?

MR. CLEMENT: No, and Georgia law is crystal clear on that, because both Wedgewood Carpets and Drug Line arise in the context where you have some past performance under an exclusivity arrangement.

And then one party or the other wants to continue the arrangement further, and so there is some past performance and — you know, and very real past performance.

I think in Wedgewood Carpets, there was a significant order that was placed. In the Drug Line

* * *

[44] And the other thing is if you look at that agreement, which is — I think it's joint appendix page 555, but, I mean, that agreement looks like an agreement that provides the kind of detail you'd expect –

CHIEF JUDGE RADER: Thank you, Mr. Clement.

MR. CLEMENT: — (inaudible).

CHIEF JUDGE RADER: Thank you very much.

Mr. Parsekian, you have three minutes.

MR. PARSEKIAN: Thank you, your Honor.

In response, the "tie-breaker" would be, with respect, the presumption of validity that we have.

We have a patent that's been issued by the United States Patent and Trademark Office. Broad terms, but it was issued after four years of fighting back and forth, and we have the presumption of validity.

And the Datamize case clearly lays out how difficult it is to find for indefiniteness, and you'd better be real careful if you're going to do that.

And Datamize also says you have to show by clear and convincing evidence, which is a very high standard.

In the district court's order, all the judge says is, "Defendant shows by clear and convincing evidence that the claim is indefinite," but it doesn't [45] say what that evidence is. There's absolutely no discussion of it whatsoever. It just says it.

And most importantly, the court then goes on and points out that we put in evidence in our expert and says we better be careful because Home Depot, in fact, put in no one skilled in the art.

So, to me, it's fatal. The district court's order right there should be reversed summarily, based on that alone. There is no — you can't just say there's clear and convincing evidence and not show it, and it is not shown.

As far as the unfair competition claim goes, paragraphs 10 through 17 of the operative complaint, which is the amended complaint, which I drafted, couldn't be more detailed in alleging bad acts.

This clearly, under the Rodime case, which is cited by the court, even in its order, clearly states facts of conduct that is not patent infringement. It's not copy — just copying.

I think counsel had said that you have to show that confusion stems from something other than copying the product. Well, clearly, we allege that it stems from something other than copying.

We allege that they went behind the backs of Romala Stone, and in a scheme to learn how to do [46] something, to talk to other companies into doing the same thing for them.

And once they did it behind their back and had it ready to go and released on the market, they then flooded the market with their product and put it in the exact same bays in the stores that Romala's product was in. That causes the likelihood of confusion.

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The consumer walks into a store. He's been buying a Romala product for two years. He goes to the same bay, sees the same exact standard size, the same exact cutouts, looks at it and says, "Wait. This is called 'Pegasus.' I thought it was 'Romala.'"

Certainly, there would be confusion. That was alleged in the –

JUDGE FRIEDMAN: Does the confusion have to be that the product that he sees is actually a Romala product?

Is that the confusion?

MR. PARSEKIAN: The confusion is that this never-before-seen product, which is a Romala product, being bought for years, suddenly has something else in its place.

And they don't know whether they're getting the quality Romala product, "Is this something else? Is this something new? What's going on here?"

[47] We allege that in the complaint, and so clearly the unfair competition claim certainly got beyond the notice pleading level.

As far as the contract goes, you know, I guess I cite the "Peeples vs. The Citizen National" in our brief for the proposition that, yes, it does fill in those terms.

I mean, the court had made that comment, and that is a concept equity that goes all the way back. We have to follow those concepts.

We have a situation here –

CHIEF JUDGE RADER: Final thoughts here, Mr. Parsekian?

MR. PARSEKIAN: Yeah.

We have a situation here where a company would get away with stealing the product of a smaller company, copying it, selling it, after making millions of dollars on that company, cutting out the middleman, being our client, Romala, in violation of unfair competition principles, patent infringement principles, and the contract itself –

CHIEF JUDGE RADER: Okay. Thank you.

MR. PARSEKIAN: — and I believe calls –

CHIEF JUDGE RADER: Thank you, Mr. Parsekian.

MR. PARSEKIAN: — for that to be reversed.

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* * *

[49] REPORTER'S CERTIFICATE

I, Annie Doezie, Certified Shorthand Reporter, in and for the State of California, do hereby certify:

That the foregoing was furnished via digital media and reported by me stenographically and later transcribed into typewriting under my direction;

That the foregoing is a true record of the media provided me for transcription.

IN WITNESS WHEREOF, I have subscribed my name this _____ day of _____, 2010.

_____

Annie Doezie, CSR No. 8478

* * * *